IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 2ND AUGUST 2007 / 11TH SRAVANA 1929

CRL.A.No. 1659 of 2003()

CC.270/2002 of JUDL.MAGISTRATE OF FIRST CLASS, PAYYOLI
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APPELLANT: COMPLAINANT

K.MOIDEEN S/O. ASSAINAR HAJI,
KOTHAMBRA VEEDU, AYANIKKADU P.O., KOYILANDI TALUK.

BY ADV. SRI.K.V.SOHAN
SRI.B.PREMNATH (E)

RESPONDENTS: ACCUSED & STATE:
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1. C.M.RAMESAN S/O. GOPALAN,
RASHMATHI, ELATHOOR P.O., KOZHIKODE DISTRICT.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY ADV. SRI.T.G.RAJENDRAN FOR R1
P.P.SRI.PUZHAKKARA MOHAMMED FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl. A. No. 1659 of 2003

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Dated this the 2nd day of August, 2007

JUDGMENT

The appeal is filed by the complainant against the judgment in C.C.No.270/2002 on the file of the Court of the Judicial Magistrate of First Class, Payyoli. The complaint was filed under section 138 of the Negotiable Instruments Act alleging that the 1st respondent borrowed an amount of Rs.90,000/- from the appellant and in discharge of the said liability he issued Ext.P1 cheque and when the cheque was presented for encashment, the same was dishonoured because of insufficiency of funds in the account of the 1st respondent. After complying the statutory formalities, the appellant filed the complaint. To prove the case against the 1st respondent, the appellant himself was examined as PW1 and Exts.P1 to P8 were marked. After completing the prosecution evidence, the 1st respondent was questioned under section 313 Cr.P.C. He denied the allegation in the complaint and stated that he had not borrowed any amount from the appellant and the cheque in question was issued in favour of one Rajan

Bhajanamatom on receipt of Rs.50,000/- from him and the said cheque was misused by the appellant for filing the complaint. To prove the case, the 1st respondent himself was examined as DW1 and Exts.D1 to D3 were marked. After considering the entire evidence, the trial court found that the appellant had failed to establish the necessary ingredients of Section 138 of the the Negotiable Instruments Act against the 1st respondent and hence the 1st respondent was acquitted under section 255(1) Cr.P.C. Aggrieved by the above, the petitioner has approached this Court.

2. Heard both sides.

3. The contention of the appellant is that the finding of the trial court regarding the rebuttal of the presumption under section 118 of the Negotiable Instruments Act is not based on any evidence or on any probability of the case suggested by the 1st respondent. The further contention of the appellant is that the case set up by the 1st respondent has not been properly considered by the trial court to come to the conclusion that the appellant failed to establish his case against the 1st respondent. The learned counsel further submits that as per section 118 of the Negotiable Instruments Act, presumption is available to the appellant regarding the consideration, time of acceptance etc. of the cheque in question. Lastly, the learned counsel contends that the appellant is entitled presumption

available under section 139 of the Negotiable Instruments Act, as the 1st respondent had not denied the execution of Ext.P1 cheque.

4. The specific case set up by the appellant is that Ext.P1 cheque was actually executed in his favour by the 1st respondent after borrowing a sum of Rs.90,000/-. The case set up by the 1st respondent is that he had borrowed an amount of Rs.50,000/- from one Rajan, Bhajanamatam and the cheque in question was handed over to him as a security. The evidence adduced by the 1st respondent would not show that the cheque in question was not signed by him. There is no evidence to show that the cheque in question which was given to said Rajan was misused by the appellant to file the complaint against the 1st respondent. In the above circumstances, the finding of the court that presumption under section 118 of the Negotiable Instruments Act was rebutted by the 1st respondent cannot be accepted unless and until it is proved that the cheque in question was not signed by the 1st respondent. It is to be noted that Ext.D2 is only an agreement, which would show that the building which belongs to the 1st respondent had been rented out to Valliyath Ammad and that had no connection with the alleged transaction. In the above circumstances, this Court is of the view that the finding entered by the trial court is perverse and it is liable to be set aside.

5.Hence, the impugned judgment is set aside and the matter is remanded to the trial court for fresh consideration. The parties are permitted to adduce evidence, if any, to substantiate their case.

The appeal is allowed by way of remand.

The parties shall appear before the trial court on 15-9-2007.

The records shall be forwarded to the trial court forthwith.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. 11 of 1999

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Judgment
31-5-2007